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POWER OF EQUITY TO ENJOIN TRESPASSES
TO REAL PROPERTY — REQUISITES FOR
THE GRANTING OF SUCH RELIEF

*Baker v. Howard Hunt, et al.*¹

The complainants owned and resided upon a farm where they conducted experiments in breeding animals and livestock, raised various crops, and engaged in other similar activities. The respondents, an association of fox-hunters, traversed, while hunting, a territory in which the complainants' farm was located. It was alleged that on several occasions the respondents had crossed the complainants' farm in pursuit of foxes, trampling crops, frightening the farm animals, and thereby disrupting the complainants' experiments. It was further alleged that on one occasion one of the complainants had been attacked by the hounds. In spite of the notice given them and their promise to avoid repetition of this conduct, the respondents apparently made no serious effort to curb these activities. From an order dismissing the bill for an injunction, the complainants appealed. *Held*: Reversed. The complainants are entitled to an injunction as their remedy at law is inadequate because of conjectural damages and the possibility of multiplicity of suits.

Equity's jurisdiction in granting relief in trespass cases arose out of its jurisdiction to enjoin waste. The earliest known case in which a trespasser was enjoined was *Flamang's Case*² wherein the Chancellor, Lord Thurlow, granted to the complainant-reversioner a decree enjoining the commission of waste by a life tenant, and also enjoined the commission of trespass by the tenant upon adjoining property of the reversioner. Lord Thurlow held that while equity would not enjoin trespass, yet in the particular case trespass and waste were so intermingled that it was necessary to enjoin both in order to grant to the complainant the full relief to which he was entitled.

Beyond this limit courts of equity were extremely reluctant to go. It was not until some thirty years later that a trespasser was enjoined when his acts had no connection with the commission of waste. In *Thomas v. Oakley*,³ Lord Eldon enjoined a trespasser from quarrying rock upon the complainant's land, basing his decision upon the similarity

¹ 171 Md. 159, 188 Atl. 223 (1936).

² 6 Ves. 147 (1780).

³ 18 Ves. 184 (1811).

of this injury and that which had been present in *Flamang's Case*.⁴ Thus the nature of the injury was recognized as the basis for the granting of the injunction. In cases of trespass as well as of waste, the nature of the injury may be such that only in equity may the complainant receive an adequate remedy. It is, of course, the inadequacy of the complainant's remedy at law that causes equity to assume jurisdiction in order that satisfactory relief may be granted.⁵

The reluctance of the English Chancellors in granting relief in cases of trespass was reflected in early American decisions. Thus, in the often cited case of *Jerome v. Ross*,⁶ Chancellor Kent refused to enjoin the removal, under color of statute, of rock from the complainant's land and held that in this, as in most trespass cases, damages at law constituted an adequate remedy. The Chancellor said that "... only in strong, aggravated instances of trespass which go to the destruction of the inheritance, or where the mischief is remediless . . ." should equity intervene.

A somewhat broader view of what should be regarded as the proper standard in determining the adequacy of the remedy at law in cases involving trespass is stated by Story, who lays down the rule that "... Courts of Equity interfere in cases of trespass . . . to prevent irreparable mischiefs, or to suppress multiplicity of suits and oppressive litigation. . . . Formerly, indeed, Courts of Equity were extremely reluctant to interfere at all, even in regard to repeated trespasses. But now there is not the slightest hesitation if the acts done or threatened to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in the future. If, indeed, Courts of Equity did not interfere in cases of this sort, there would (as has been truly said) be a great failure of justice in this country."⁷

In his "Equitable Remedies",⁸ Pomeroy points out that the scope of equity's jurisdiction in cases of trespass to real property has been extended to cover cases including one or more of the following elements: Irreparable injury,⁹ con-

⁴ Supra note 2.

⁵ Pomeroy, *Equity Jurisprudence*, (Fourth Edition), Sec. 1907. 14 R. C. L., Secs. 143, 144, and 146. Miller, *Equity Procedure*, Sec. 157. Story, *Equity Jurisprudence*, (Fourteenth Edition), Sec. 1258. *Banks v. Bussey*, 34 Md. 437 (1871). *Cumberland and Pennsylvania R. R. Co., et al.*, 57 Md. 267 (1881). *Whalen v. Delashmutt*, 59 Md. 250 (1883).

⁶ 7 Johns. Ch. 407, 11 Am. Dec. 484 (1823).

⁷ *Equity Jurisprudence* (Fourteenth Edition), Sec. 1258.

⁸ *Ibid*, beginning at Sec. 1907.

⁹ *Ibid*, Sec. 1909.

tinuing or repeated trespasses,¹⁰ insolvency on the part of the respondent,¹¹ impossibility of estimating the injury in terms of money damages.¹² In the event that any of these elements are present, the complainant is regarded as without an adequate remedy at law.¹³

In the early Maryland case of *Duval v. Waters*,¹⁴ the Chancellor recognized that in cases of trespass as well as of waste, threatened irreparable injury to the inheritance is not adequately compensable by damages at law. In that case an injunction was granted pending the determination of the disputed title.

An attempt to formulate a standard for measuring the adequacy of a remedy at law in trespass cases is seen in *Amelung v. Seckamp*.¹⁵ The complainant, asserting a right of user over the respondent's private road to the highway, sought to enjoin the respondent's obstruction of the road. A suit at law, brought by the complainant, was pending. The court stated the rule, in negative form, that irreparable injury, or multiplicity of suits, or some special circumstances must be shown in order to justify the issuing of an injunction. *Jerome v. Ross*¹⁶ and Story's "Equity Jurisprudence"¹⁷ were cited with approval. An injunction was refused on the ground that no irreparable injury was shown. In *George's Creek Coal and Iron Co. v. Detmold*¹⁸ it was held that if the act complained of is one which has been held and enjoyed, even though there is no threat of the destruction of the physical substance of the estate, it may be enjoined on the ground that irreparable injury is threatened. In that case, the complainant, who had leased certain of his lands to the respondent for the purpose of conducting mining operations thereon with the right to cut timber on the tract leased and upon adjoining lands as incidental to the conduct of such operations, sought to enjoin the respondent's cutting of timber for the purpose of operating a saw-mill. The Court held that the cutting of timber on the tract leased and upon the complainant's adjoining lands did not constitute irreparable injury, for the cutting of timber had been authorized and that it was only the purpose of the respondent in so doing that rendered his acts objectionable.

¹⁰ *Ibid.*, Sec. 1910.

¹¹ *Ibid.*, Sec. 1911.

¹² *Ibid.*, Sec. 1912.

¹³ See also 14 R. C. L., Secs. 145-148, 152-153, 156-159.

¹⁴ 1 Bland 569 (1827).

¹⁵ 9 G. & J. 468 (1838).

¹⁶ *Supra* note 6.

¹⁷ See *Supra* note 7.

¹⁸ 1 Md. Ch. 371 (1848).

The general rule as stated in these cases has been followed and stated in the same or similar language in numerous other cases.¹⁹

The definition of "irreparable injury" was clarified in *Shipley v. Ritter*²⁰ and was extended somewhat beyond the view expressed in *Jerome v. Ross*.²¹ In enjoining the cutting of ornamental shade trees by a trespasser, the court held that equity's jurisdiction depended, not upon the monetary value of the property threatened, but upon a policy of safeguarding the use and enjoyment of the estate from destruction by a trespasser in its character as so used and enjoyed. "The owner is entitled to its just and reasonable enjoyment, or to have full and complete remuneration for being disturbed therein; and whenever the court can see that the acts complained of are of a character, necessarily, to affect permanently such use, and do not admit of perfect pecuniary compensation, . . . it would be a denial of justice not to stay the hand of the destroyed . . .".

Thus, injury not admitting "of perfect pecuniary compensation" is deemed irreparable and an action at law is an inadequate remedy. If courts of law provide no means of measuring damages to cover fully the peculiar or special injury to which the complainant is exposed, an injunction may issue.²²

In the instant case, the trial court held,²³ after citing *Gilbert v. Arnold*,²⁴ that no irreparable injury was shown, as the evidence indicated that no crops grew upon the com-

¹⁹ *Hamilton v. Ely*, 4 Gill 34 (1846). *Cockey v. Carroll and Lawrenson*, 4 Md. Ch. 344 (1849). *Herr v. Beirbower*, 3 Md. Ch. 456 (1851). *Carlisle v. Stevenson*, 3 Md. Ch. 379 (1850). *Chesapeake and Ohio Canal Co. v. Young*, 3 Md. 480 (1853). *White v. Flannigan*, 1 Md. 543 (1852). *Green v. Keen*, 4 Md. 106 (1853). *Shipley v. Ritter*, 7 Md. 408 (1855). *Cherry v. Steig*, 11 Md. 1 (1858). *Riddell v. Byron*, 14 Md. 444 (1859). *Ford v. Groves*, 29 Md. 187 (1868). *Mayor, etc. of Frederick v. Groshon*, 30 Md. 436 (1869). *Nicodemus v. Nicodemus*, 41 Md. 529 (1875). *Whalen v. Delashmutt*, supra note 5. *Schmidt v. Blaul*, 66 Md. 141, 6 Atl. 669 (1886). *Baltimore Belt R. R. Co. v. Lee*, 75 Md. 595, 23 Atl. 901 (1892). *Long v. Ragan*, 94 Md. 462, 51 Atl. 181 (1902). *Carswell v. Swindell*, 102 Md. 636, 62 Atl. 956 (1906). *Chesapeake Co. v. Mt. Vernon Co.*, 107 Md. 532, 69 Atl. 256 (1908). *Didier v. Merryman*, 114 Md. 434, 79 Atl. 597 (1911). *Oberheim, et al. v. Reeside, et al.*, 116 Md. 265, 81 Atl. 590 (1911). *Douglass v. Riggan*, 123 Md. 18, 90 Atl. 1000 (1914). *Levinson and Zenitz v. Bonaparte*, 131 Md. 634, 102 Md. 998 (1917). *Waring v. Stinchcomb*, 141 Md. 568, 119 Atl. 336 (1922). *Cityco Realty Co. v. Slaysman, et al.*, 160 Md. 356, 153 Atl. 278 (1930).

²⁰ Supra note 19.

²¹ Supra note 6.

²² See also: *Roman v. Strauss*, 10 Md. 89 (1856). *McCreery v. Sutherland*, 23 Md. 471 (1856). *Watson v. Sutherland*, 5 Wall. 74 (1866). *Dudley v. Hurst*, 67 Md. 45, 8 Atl. 901 (1887). *Cityco Realty Co. v. Slaysman, et al.*, supra note 19.

²³ *Baltimore Daily Record*, April 30, 1936.

²⁴ 30 Md. 29 (1869).

plainants' land during the hunting season. Inherent in the opinion seems to be an adherence to the earlier definition of irreparable injury as "destruction of the inheritance" or of the physical substance of the estate. No other factors which would render the complainants' remedy at law inadequate were considered in the opinion. Since the respondents were financially responsible, the injunction was refused.²⁵

In the decision on appeal the Court of Appeals points out that the complainants had the right to use and enjoy their property in a lawful and reasonable manner and that their exercise of that right appeared to have been both lawful and reasonable. On the other hand, the respondents had the right to hunt, and in a very striking passage of the opinion, the Court graphically describes the glamour, exhilaration, and wholesomeness of the sport of fox-hunting. But the right of the huntsman is subordinate to that of the landowner; its enjoyment is conditioned upon non-interference with the use and enjoyment of the estate. If, as in this case, huntsmen invade lands against the will of the owners thereof, they are trespassers. The Court quoted the English case of *Paul v. Summerhayes*:²⁶ "There is no principle of the law that justifies trespassing over the lands of others for the purpose of fox-hunting."

The Court concluded that, for these trespasses, the complainants have no adequate remedy at law. The principal injuries are of an intangible character. Interference with the complainants' conduct of stockbreeding and other experiments is regarded as resulting in damage of such a character as not to be capable of satisfactory monetary evaluation or compensation. The alleged physical damage, such as the trampling of crops, which might be susceptible of measurement in damages at law, was thought to be a minor element of the wrong. Thus the Court indicated that the element of irreparable injury was present.

It is at least arguable that no irreparable injury actually was shown by the complainants. As has already been pointed out, the rule laid down in the earlier cases as to what type or kind of damage might be classified in this category was quite strict. Chancellor Kent did not regard the severing and removal of rock from the complainants'

²⁵ By statute, Md. Code, Art. 16, Sec. 87; Art. 26, Sec. 25, it is provided that no injunction shall be refused on the ground that the complainant has an adequate remedy at law unless the respondent can show that he is financially responsible or unless he posts bond for damages and costs which may be assessed against him at law.

²⁶ 4 Q. B. D. 9 (1878).

land as a wrong irremediable by an action at law.²⁷ The cutting of timber upon the complainant's estate was viewed in *George's Creek v. Detmold*,²⁸ in *Hamilton v. Ely*,²⁹ and in *Green v. Keen*³⁰ as adequately compensable in money damages. These cases illustrate the view that, in order to justify the issuance of an injunction, substantial physical destruction of the estate must be shown. Certainly, if this definition of irreparable injury were literally accepted and followed, as it apparently was by the trial court, such injury, if present at all, is a negligible element in the case.

However, under the broader doctrine of some of the later cases, interference with the reasonable use and enjoyment of the estate, in the manner in which its owners seek to utilize it, may also be considered irremediable damage, even though little or no actual physical damage is inflicted. Thus, under the view enunciated in *Shipley v. Ritter*,³¹ it is not the quantity or commercial value of the property destroyed which renders the damage irreparable, but the effect of this destruction as an interference with the enjoyment of the estate. In *Gilbert v. Arnold*³² it was held that the respondents' mere unauthorized use and occupancy of a church, where there was no actual destruction of property shown, entitled the trustees and members of the church to an injunction as this interference was not compensable in money damages. Injury which cannot be measured by any pecuniary standard of value was viewed in *Dudley v. Hurst*³³ as irreparable. Under this view, an injunction on the ground of irremediable damage might be justified as the facts showed an interference with the complainants' use of their estate resulting in damage of a nature so intangible that it could not well be estimated by a jury in an action at law.

But there is another ground more strongly relied upon by the court for holding that an injunction should issue. The complainants' remedy at law is viewed as inadequate because of the threat of repetition of the trespasses. There is shown in this case a series of trespasses, not continuous, but part of a single course of conduct, interfering with the complainants' use and enjoyment of their property. Sending the complainants to seek their remedy at law might well result in multiple litigation for very meagre compensation.

²⁷ *Jerome v. Ross*, supra note 6.

²⁸ Supra note 18.

²⁹ Supra note 18.

³⁰ Supra note 18.

³¹ Supra note 19.

³² Supra note 24.

³³ Supra note 22.

Where there is a repetition of the acts complained of, or a threat of repetition, or where the act is inflicting injury of a continuing nature, it has frequently been stated in Maryland that an injunction will issue to prevent a multiplicity of suits. There was a diversity of opinion among the authorities as to the meaning of this term. Some earlier cases, including *Jerome v. Ross*,³⁴ seem to hold that if the trespasses were committed by the same respondent against whom the complainant's only redress was a separate action for each invasion of his legal rights, this would not constitute such a multiplicity of litigation as would justify the issuance of an injunction. If a number of different persons were responsible for the injuries to the complainant, then the necessity of bringing separate actions at law against these numerous parties would result in such a multiplicity of suits that equity's aid might be secured by the complainant.³⁵

A more liberal view holds that if the same trespasser or group of trespassers repeats and manifests the intention of further repetition of acts injurious to the complainant or has committed acts which have resulted in a continuing trespass a multiplicity of suits is threatened.³⁶ A number of Maryland cases have regarded a multiplicity of injuries as well as a multiplicity of parties as a factor in rendering the complainant's remedy at law, by numerous separate suits, inadequate.³⁷

An examination of those decisions of the Maryland Court of Appeals (prior to 1930) holding that the complainant was entitled to an injunction against the repeated or continuing trespasses complained of, and citing multiple litigation at law as one ground for the granting of such relief, reveals that in those cases irreparable injury also was considered present. Indeed, in *Whalen v. Delashmutt*,³⁸ where the complainant had sought to enjoin the erection of a post upon a strip of his land, the court held that irreparable injury

³⁴ *Supra* note 6.

³⁵ Walsh, *Equity*, Sec. 30; Pomeroy, *Equity Jurisprudence* (Fourth Edition) Sec. 1910.

³⁶ *Ibid.* See also: 32 C. J., Secs. 79-87, and 14 R. C. L., Secs. 50-55.

³⁷ *Carlisle v. Stevenson*, *supra* note 19. *Amelung v. Seekamp*, 9 G. & J. 408 (1838). *White v. Flannigan*, *supra* note 19. *Shipley v. Ritter*, *supra* note 19. *Gilbert v. Arnold*, 30 Md. 29 (1869); *Mayor etc. of Frederick v. Groshon*, *supra* note 19. *Whalen v. Delashmutt*, *supra* note 5. *Baltimore Belt R. R. Co. v. Lee*, *supra* note 19. *Blondell v. Consolidated Gas Co.*, 89 Md. 732, 43 Atl. 817 (1889). *Long v. Ragan*, *supra* note 19. *Chesapeake Co. v. Mt. Vernon Co.*, 107 Md. 532, 69 Atl. 256 (1908). *Waring v. Stinchcomb*, *supra* note 19. *Cityco Realty Co. v. Slaysman, et al.*, *supra* note 19.

³⁸ *Supra* note 5.

was an element essential to justify the intervention of equity to restrain a trespasser and that since such damage had not been shown, no injunction would issue.³⁹

However, not quite fifty years after *Whalen v. Delashmutt* had been decided, a majority of the Court of Appeals held in *Cityco Realty Co. v. Slaysman*⁴⁰ that the repetition of trespasses by the respondent upon a strip of land belonging to the complainant should be enjoined in order that a multiplicity of suits might be prevented. No irreparable injury had been shown and, upon this ground, there was dissent which cited the rule of *Whalen v. Delashmutt*.

Since it seems at least doubtful whether any irreparable injury had been shown here, the instant case appears to give much greater weight to the element of multiplicity of suits than was given under the view expressed in *Whalen v. Delashmutt*. The opinion does not cite *Cityco Realty Co. v. Slaysman* but, in effect, it adheres to the rule of the majority in that case, and regards multiplicity of litigation not simply as an incidental ground aggravating the principal injury, but as a determining factor in rendering the complainants' remedy at law inadequate.

The respondents contended that, under the doctrine of *Calvert v. Gosling*,⁴¹ no injunction should issue as there was no evidence of an intention on their part to trespass upon the complainants' land. This doctrine was rejected by the court. Even though the intentions of the respondents might have been good, equity's relief should not be barred, especially where the evidence showed that the respondents permitted the pack so far to escape from their control that it became impossible to prevent the hounds from going where the respondents did not wish them to go. Although the court cited with approval Pomeroy's rule⁴² that, where the defendant manifests an intent or purpose to persist in his unlawful acts, the threat of repetition will justify the issuance of an injunction, the court seems to be holding, in effect, that intent to commit the particular act is not material. It is sufficient if the respondent intends to persist in a course of conduct that will render possible the repetition of such trespasses.

On these grounds, namely, the difficulty of estimating the injuries in terms of money damages and the threat of repetition which would give rise to a multiplicity of suits, the

³⁹ See also, *Nicodemus v. Nicodemus*, supra note 19.

⁴⁰ Supra note 19.

⁴¹ 5 Times L. R. 185, Q. B. D.

⁴² Loc. cit. supra note 35.

court held that the complainants were without an adequate remedy at law. Therefore, the decision of the court below was reversed and the cause was remanded for appropriate relief.

While the result appears to be an extension of the doctrines of some of the earlier Maryland cases, the decision seems to be in accord with the overwhelming weight of American authority.⁴³ A typical expression of the views of the majority was voiced in *West Virginia Pulp and Paper Co. v. Cheat Mountain Club*,⁴⁴ where it was said with regard to continuing and repeated trespasses that ". . . one person cannot take the property of another without his consent or continually trespass upon it and compel the owner to accept payment of money in satisfaction. The rule applies with special force where the threatened trespass would result in depriving the complainant of the enjoyment of a property right."

⁴³ See cases collected in notes in: 32 A. L. R. 463; 92 A. L. R. 578; 14 R. C. L., Secs. 143-148, 152-154, 156-159, and the additional annotations at 5 R. C. L. Permanent Supplement.

⁴⁴ 212 Fed. 373 (C. C. A. Fourth Circuit 1914).
